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No. 86-858

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK REEDER,
Petitioner,

vs.

KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities i
Reasons for Granting the Writ 1
Conclusion 8

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 3-4
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 6, 7
Buckley v. Valeo, 424 U.S. 1 (1976) 3
Carey v. Brown, 447 U.S. 455 (1980) 4
Dunn v. Blumstein, 405 U.S. 331 (1972) 7
Hopfmann v. Connolly, 471 U.S. ....., 85 L.Ed.2d 469 (1985) 2
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 2
Plyler v. Doe, 457 U.S. 202 (1982) 6, 7
Pollard v. Board of Police Commissioners, ... U.S. ....., 87 L.Ed.2d 657 (1985) 1, 3
Pollard v. Board of Police Commissioners, 665 S.W.2d 333 (Mo. *en banc* 1984) 2
Reeder v. K.C. Board of Police Commissioners, 733 F.2d 543 (8th Cir. 1984) 3
Reynolds v. Sims, 377 U.S. 533 (1964) 5

Constitutional and Statutory Provisions

U.S. Constitution, Amend. I 4
U.S. Constitution, Amend. XIV 4, 5
R.S.Mo. §84.830 (1978) 3, 4, 5, 7

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REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DENIAL OF CERTIORARI IN THE POLLARD CASE DOES NOT FORECLOSE CERTIORARI AT BAR.

Respondents claim that certiorari should be denied at bar because of this Court's earlier denial of certiorari in *Pollard v. Board of Police Commissioners*, ... U.S. ....., 87 L.Ed.2d 657 (1985), a case involving an issue

similar to the one raised by Petitioner herein. Petitioner would submit Respondents misperceive entirely the precedential effect of a denial of certiorari.

It is axiomatic that the denial of a petition for writ of certiorari is wholly without precedential value in other cases. In *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950), Justice Frankfurter noted that the denial of certiorari may be the result of any number of different reasons:

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

The rule withholding precedential effect from a denial of certiorari is applicable even if the issues presented in the earlier case (where certiorari was denied) are identical to those presented in a later petition (where it is sought anew), *Hopfmann v. Connolly,* 471 U.S. ....., 85 L.Ed.2d 469, 471 (1985).

That rule is especially appropriate at bar. The portion of the opinion of the Missouri Supreme Court in *Pollard v. Board of Police Commissioners,* 665 S.W.2d 333, 342 (1984), considering the equal protection issue consists of one short paragraph. That Court notes that, "[the equal protection] argument was not relied on by the trial court or briefed on appeal." *Ibid.* Not surprisingly, the Missouri Supreme Court summarily denied the equal protection claim.

When Petitioner's cause was decided by the Eighth Circuit the first time, that Court declined to follow the Missouri Supreme Court's disposition of the equal pro-

tection issue, holding that, "the defendants ought to be allowed a chance to offer evidence to justify the seeming disparity between Kansas City and other police departments in the state." *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543, 549 (8th Cir. 1984). For that reason the Eighth Circuit remanded Petitioner's cause to the district court to further develop the equal protection issue.

This Court's denial of certiorari in *Pollard* occurred *after* the first *Reeder* opinion. Inferably, some of the six members of this Court who voted against certiorari in *Pollard* may have been animated by a desire to see the equal protection issue "further illuminated by the lower court", following the remand in *Reeder.*

This Court's denial of certiorari in *Pollard* should not prejudice Petitioner's right to reasoned consideration of his petition for writ of certiorari.

II. THE DECISION OF THE EIGHTH CIRCUIT RAISES ISSUES OF NATIONAL SIGNIFICANCE.

Point II of Respondents' Brief is somewhat arcane. Apparently they argue that there are no "special and important reasons" to justify a grant of certiorari per Rule 17 because the classification established by R.S.Mo. §84.830 (1978), does not impact "upon any federally protected interests of individuals within the state." (Respondents' Brief at 7.)

This is a fanciful argument. It can hardly be gainsaid that limitations upon the freedom to make political contributions "implicate fundamental First Amendment interests," *Buckley v. Valeo,* 424 U.S. 1, 23 (1976); *Abood*

v. Detroit Board of Education, 431 U.S. 209, 234 (1977). Since the classification created by §84.830 only burdens the exercise of First Amendment rights by Kansas City police officers, the Equal Protection Clause mandates that the classification be subjected to strict scrutiny, *Carey v. Brown,* 447 U.S. 455, 461-462 (1980).

Respondents argue that the instant cause is important only to members of the Kansas City Police Department and that the Eighth Circuit's decision will not affect anyone other than the parties to this cause. At best Respondents' argument is naive.

The Eighth Circuit's opinion deftly avoids the need to examine the justifications for the disparate treatment imposed under §84.830 by holding that the classification is wholly outside *any* protection under the Fourteenth Amendment because discrimination is imposed on a territorial basis. This is a radical departure from the equal protection cases decided by this Court over the last two decades.[1]

It may be that this Court will ultimately decide that invidious discrimination is permissible if parcelled out on a geographic basis. It is, however, intellectually dishonest to argue that this is an issue of little national importance. A decision on whether or not the states may, consistent with the Equal Protection Clause, accord a lesser measure of First Amendment rights to some groups on the basis of their residence will profoundly shape the contours of future decisions concerning the Fourteenth Amendment. Certiorari should be granted.

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1. This argument is developed more fully in the Petition for Writ of Certiorari and will not be repeated here.

III. SECTION 84.830 VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Fact That the Invidious Discrimination Practiced Under the Statute Is Imposed on a Geographic Basis Does Not Exempt It From Review Under the Equal Protection Clause.

Respondents resurrect the bromide that the Equal Protection Clause protects people and not places, thereby substituting a slogan for substantive analysis. Much of the argument under Point III A of their brief is answered in the Petition for Writ of Certiorari filed by Petitioner which will not be repeated here.

Petitioner would simply note that no case decided by this Court has ever held that invidious discrimination—i.e. a classification that burdens a suspect class or trammels a fundamental right—is beyond the scope of Fourteenth Amendment strict scrutiny because the discrimination was based on its victim's residence. To the contrary, the notion that a diminished level of fundamental rights can be afforded on the basis that "an individual lives here or there" has been held to be offensive to the Equal Protection Clause, *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

B. Because Section 84.830 Classifies Employees in Terms of Their Ability to Exercise Fundamental Rights, It Is Subject to Strict Scrutiny.

Respondents argue that even if the Fourteenth Amendment does protect against geographic discrimination, §84.830 is not subject to strict scrutiny because this Court must defer to the states when they impose restrictions on political activities by their employees and when they de-

termine to whom such restrictions apply. Respondents' argument is unsound for two reasons.

First, it ignores the limits on deference to the states where classifications are invidiously discriminatory. In *Plyler v. Doe,* 457 U.S. 202 (1982), the Court recognized that States must have substantial latitude in establishing legislative classifications. It also recognized the limits to that latitude:

> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus, we have treated as presumptively invidious those classifications that . . . impinge upon the exercise of fundamental right.

457 U.S., at 216-217. Respondents cite no case that undercuts the soundness of this principle or which indicates that, insofar as similarly situated groups are concerned, the Equal Protection Clause permits something less than strict scrutiny to uphold invidious discrimination.

The other reason for the unsoundness of Respondents' argument is that they misapprehend the holding of the principal case on which they rely, *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). In that case this Court held that the Fourteenth Amendment permitted classified and unclassified employees of the State of Oklahoma to be treated differently in terms of the political activities in which they could engage. In a footnote the Court upheld that restriction against an equal protection challenge, 413 U.S., at 607 n.5. The Court did not discuss the standard of review it employed.

Petitioner would submit that the footnote in *Broadrick* simply recognized the familiar rule that different groups may be treated differently. As noted in *Plyler v. Doe*, supra:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." [Citation omitted.] But so too, "the Constitution does not require things which are different in fact . . . to be treated in law as though they were the same."

457 U.S., at 216.

The situation in *Broadrick* and the case at bar should be contrasted. In *Broadrick* different groups of employees —classified and unclassified—were treated differently. In contrast §84.830 treats persons who are similarly situated —Kansas City and other Missouri police officers—differently. Section 84.830 is a classic example of a law that transgresses the command of the Equal Protection Clause that "all persons similarly circumstanced shall be treated alike," *Plyler v. Doe*, supra, 457 U.S., at 216. Because of the invidiousness of the legislative classification involved, the reasons offered to justify the discrimination must withstand strict scrutiny.

Significantly, Respondents make no effort to justify §84.830 under a strict scrutiny standard. Presumably, that is so because they recognize that a legislative scheme which accords St. Louis police officers the right to make political contributions while denying that same right to Kansas City police officers can never be shown to be "*necessary* to the achievement of a *compelling* state interest," *Dunn v. Blumstein*, 405 U.S. 331, 342 (1972).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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